IN THE
TENTH COURT OF APPEALS

No. 10-19-00196-CR

IJAH IWASEY BALTIMORE,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 54th District Court
McLennan County, Texas
Trial Court No. 2017-449-C2

OPINION

Ijah Baltimore appeals from a conviction for unlawful possession of a weapon on premises licensed to sell alcohol. TEX. PENAL CODE ANN. § 46.02(c). In his sole issue, Baltimore complains that the evidence was insufficient for the jury to have found that he committed the offense on the premises of an establishment licensed to sell alcohol because there was insufficient evidence for the jury to have found that the parking lot

where he possessed the firearm was part of the premises of the establishment.[1] Because we find that the evidence was sufficient, we affirm the judgment of the trial court.

STANDARD OF REVIEW—SUFFICIENCY OF THE EVIDENCE

The Court of Criminal Appeals has expressed our standard of review of a sufficiency issue as follows:

> When addressing a challenge to the sufficiency of the evidence, we consider whether, after viewing all of the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017). This standard requires the appellate court to defer "to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. We may not re-weigh the evidence or substitute our judgment for that of the factfinder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). The court conducting a sufficiency review must not engage in a "divide and conquer" strategy but must consider the cumulative force of all the evidence. *Villa*, 514 S.W.3d at 232. Although juries may not speculate about the meaning of facts or evidence, juries are permitted to draw any reasonable inferences from the facts so long as each inference is supported by the evidence presented at trial. *Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016) (*citing Jackson*, 443 U.S. at 319); *see also Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007). We presume that the factfinder resolved any conflicting inferences from the evidence in favor of the verdict, and we defer to that resolution. *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). This is because the jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to the testimony. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). Direct evidence and circumstantial evidence are equally

[1] Baltimore does not challenge that he was unlawfully carrying a weapon in this appeal. His complaint is whether the State proved the element necessary to enhance the offense from a Class A misdemeanor to a third degree felony, specifically did he carry the weapon on the premises licensed or issued a permit by the State for the sale of alcoholic beverages.

> probative, and circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015); *Hooper*, 214 S.W.3d at 13.
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> We measure whether the evidence presented at trial was sufficient to support a conviction by comparing it to "the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The hypothetically correct jury charge is one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id*.; *see also Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013). The "law as authorized by the indictment" includes the statutory elements of the offense and those elements as modified by the indictment. *Daugherty*, 387 S.W.3d at 665.

Zuniga v. State, 551 S.W.3d 729, 732-33 (Tex. Crim. App. 2018).

UNLAWFULLY CARRYING A WEAPON

> Section 46.02(a) of the Penal Code states that:
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> (a) A person commits an offense if the person:
> (1) intentionally, knowingly, or recklessly carries on or about his or her person a handgun; and
> (2) is not:
> (A) on the person's own premises or premises under the person's control; or
> (B) inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control.

TEX. PENAL CODE ANN. § 46.02(a). This offense is a third-degree felony "if the offense is committed on any premises licensed or issued a permit by this state for the sale of alcoholic beverages." TEX. PENAL CODE ANN. § 46.02(c).

Section 46.02 sets forth a definition of "premises" as including "real property and a recreational vehicle that is being used as living quarters, regardless of whether that use is temporary or permanent." TEX. PENAL CODE ANN. § 46.02(a-2). The charge to the jury did not include that definition, however. There was no dispute that Baltimore was not on his own premises or premises under his control. Rather, presumably because the offense is elevated if it is "committed on any premises licensed or issued a permit by this state for the sale of alcoholic beverages," the jury charge included the definition of "premises" contained in the Alcoholic Beverage Code relating to premises of an establishment licensed to sell alcoholic beverages.[2] Section 11.49(a) of the Alcoholic Beverage Code defines "licensed premises" as:

> the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.

TEX. ALCO. BEV. CODE ANN. § 11.49(a). Baltimore complains that there was no evidence regarding the boundaries of the premises including whether the parking lot was "grounds" or "directly or indirectly under the control" of Crying Shame.[3]

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[2] No challenge has been made to the propriety of the instruction given in the jury charge; therefore we will assume without deciding that the instruction was proper.

[3] We should not be understood as holding that the parking lot of a business that is licensed to sell alcoholic beverages is necessarily part of the premises as that term is used in connection with the penal code provision at issue in this appeal. Nor have we been asked to determine whether "premises" as defined by the Alcoholic Beverage Code is consistent with or even relevant to the penal code provisions regarding "premises" as defined elsewhere in the penal code. *See, e.g.*, TEX. PENAL CODE ANN. § 46.035(f)(3). Those issues are simply not before us in this appeal. Baltimore has not contested the jury's

FACTS

Baltimore went to Crying Shame, which was undisputedly an establishment licensed to sell alcohol, on his motorcycle. Baltimore parked very close to the front door of Crying Shame, which was shown on a photograph admitted into evidence. Baltimore had a firearm which he testified that he left in the saddlebag attached to his motorcycle while he was inside Crying Shame. Baltimore left approximately thirty minutes later and went to his motorcycle. Baltimore testified that he removed his cold gear including his jacket from the saddlebags and put it on because it was cold outside. The gun had been wrapped up in the jacket. While standing next to his motorcycle, Baltimore also put the firearm which had been wrapped up in his jacket in his pants.

Johnson, an individual with whom Baltimore had a previous disagreement, Johnson's then-girlfriend, and her cousin were departing Crying Shame when Baltimore was in the parking lot. The testimony was disputed as to whether they had seen each other in Crying Shame or only outside, but it is not relevant to this issue. Johnson testified that he went to his vehicle and pulled it up toward Baltimore's motorcycle. Johnson's girlfriend was in a separate vehicle parked behind Johnson. Johnson's girlfriend testified that she saw Baltimore approach the driver's side window of Johnson's vehicle. As Johnson attempted to back up, Baltimore put his foot behind one

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finding that he unlawfully possessed the firearm. The only question is whether for this offense the State proved that the area immediately outside the front door and the parking lot are premises of Crying Shame.

of the tires on Johnson's vehicle, preventing him from backing up without running over Baltimore's foot. Johnson pulled forward slightly. Johnson's girlfriend had approached Johnson's vehicle. She testified that she saw Baltimore pull out the firearm and point it at Johnson. Johnson's girlfriend's cousin grabbed Baltimore and wrested the firearm away from him. The cousin pistol-whipped Baltimore with the gun and then threw it on the roof of Crying Shame after Baltimore demanded that he give it back. The firearm was later recovered from the roof of Crying Shame by law enforcement. The proprietors of Crying Shame assisted law enforcement in its investigation by preventing the remaining patrons from leaving the building to go into the parking lot in question while the firearm was retrieved.

Johnson and his girlfriend both testified that the altercation took place in the parking lot of the Crying Shame. Two law enforcement officers testified that the offense occurred in the parking lot of the Crying Shame. Specifically, one of the officers testified without objection that the parking lot was included as part of the premises of Crying Shame and that the legal definition of "premises" pursuant to the Alcoholic Beverage Code includes the parking lot. Photographic evidence showed that the offense occurred in the immediate proximity of the front door to the building of Crying Shame. The management of Crying Shame exercised some degree of control over the parking lot by preventing the patrons from going on the premises where the investigation was then ongoing.

In *Richardson v. State*, the appellant challenged the sufficiency of the evidence regarding what constituted the premises of a convenience store and if the parking lot was included. *Richardson v. State*, 823 S.W.2d 773 (Tex. App.—Fort Worth 1992, no pet.). The court held that the parking lot was included in what was likely dicta, as the appellant had taken the weapon into the convenience store as well as the parking lot. However, the court specifically stated that "the parking lot of a licensed premises is part of the 'premises' pursuant to section 11.49(a) of the Alcoholic Beverage Code." *Id*. That court cited to another case, *Wishnow v. State*, in support of that holding. *See Wishnow v. Texas Alcoholic Beverage Com'n*, 757 S.W.2d 404 (Tex. App.—Houston [14th] 1988, pet. denied). In *Wishnow*, the appellant challenged the sufficiency of a hearing examiner's findings regarding a suspension of a permit due to a violation based on a delivery of a controlled substance on the sidewalk outside of a club by the appellant's doorman because there was testimony that the appellant frequently monitored the parking lot and therefore it was part of the premises of the club. *See Wishnow*, 757 S.W.2d at 410. Based on the reliance upon *Wishnow's* description of the evidence presented regarding sufficiency of evidence to establish whether the sidewalk was part of the premises of the club, Baltimore contends that the evidence in this proceeding was lacking regarding whether the parking lot of Crying Shame was "grounds" or "adjacent premises directly or indirectly under the control" of Crying Shame.

The holding in *Richardson* was followed by the Amarillo court of appeals in

Romero v. State, No. 07-06-0198-CR, 2008 Tex. App. LEXIS 4221, at **10-13 (Tex. App.—Amarillo June 11, 2008, no pet.) (mem. op., not designated for publication). In *Romero*, a challenge was made to the sufficiency of the evidence regarding whether a parking lot was "directly or indirectly under the control" of the licensed business. The court recognized that there is a difference between what is required to be proved between "grounds" and "adjacent premises" in finding that the testimony regarding the parking lot that was immediately outside of the licensed business as "grounds" to be sufficient. Baltimore argues that we should not follow the *Richardson* and *Romero* courts' holdings but should require more than close proximity in determining that a parking lot is part of the licensed premises of an establishment.

Baltimore argues that in order for the evidence to have been sufficient, the State was required to present specific evidence that the parking lot was "grounds or an adjacent premises that was directly or indirectly under the control of Crying Shame." Baltimore further cites to *Terry v. State* as an example of what evidence should be required to establish what constitutes premises. *See Terry v. State*, 877 S.W.2d 68, 70 (Tex. App.—Houston [1st Dist.] 1994, no pet.). In *Terry*, the evidence held to be sufficient to establish what constituted licensed premises included the TABC license of the establishment and evidence by an employee that the establishment maintained the parking lot that its customers routinely used where the defendant was found with a weapon near a dumpster that the establishment owned. While certainly the State could

have presented more precise evidence defining the legal standing between Crying Shame and the parking lot, Baltimore has not provided any authority to show that the testimony that the parking lot was the parking lot of Crying Shame was not sufficient for any rational juror to find that the parking lot was part of the licensed premises of Crying Shame. Therefore, we hold that the uncontroverted evidence that was before the jury supports a rational jury conclusion that the offense occurred on the licensed premises of Crying Shame. We overrule Baltimore's sole issue.

CONCLUSION

Having found no reversible error, we affirm the judgment of the trial court.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed August 26, 2020
Publish
[CR25]